No. 15,335

United States Court of Appeals

For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,

Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLEE PRUDENTIAL ASSURANCE COMPANY.

LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, COOK, QUINBY & TWEEDT,
1000 Merchants Exchange Building,
San Francisco 4, California,
Attorneys for Appellee Prudential Assurance Company.

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 15,335

United States Court of Appeals
For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,
Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLEE PRUDENTIAL ASSURANCE COMPANY.

This is an appeal by the Canadian Indemnity Company (plaintiff below) from a judgment in declaratory relief determining the rights, duties and obligations of appellant and appellees Ohio Farmers' Indemnity Company and Prudential Assurance Company under their respective policies of insurance to discharge a judgment against Louis Stores, Inc., the

assured under said policies, in favor of one Virginia Christensen for personal injuries.

STATEMENT OF CASE.

Appellee Prudential Assurance Company, hereafter called Prudential, cannot accept appellant's statement of the case, which refers only to parts of the record and makes conclusions and observations not contained in the record. Appellee Prudential therefore sets forth the following statement of the case:

One Virginia Christensen suffered personal injuries on September 17, 1954, while shopping in a store operated by Louis Stores, Inc. (R. 33).

Appellant Canadian, by its policy No. 25 CPL 1911, insured Louis Stores, Inc. against liability for bodily injuries to a person injured on the premises of said store to a limit of $100,000.00. Said policy was in effect at the time said Virginia Christensen was injured. Said policy was admitted in evidence in the Court below but has not been made a part of the printed record here (Finding V, R. 50).

Appellee Ohio, by its policy No. CL 7591, also insured Louis Stores, Inc. against such liability to a limit of $10,000.00 each person. Said policy was also introduced in evidence upon the trial of this action, but only excerpts therefrom are contained in the printed record (Finding VI, R. 51-53).

Appellee Prudential also issued its policy No. EB 32914-C insuring Louis Stores, Inc. against liability for bodily injuries to persons injured on the premises

of said store for a limit of $40,000.00 each person, excess over the $10,000.00 limit provided for in Ohio's said policy. Prudential's policy further provides that liability shall attach thereunder only after Ohio, as primary insurer, has paid or has been held liable to pay the sum of $10,000.00 on behalf of the assured to any one person for personal injuries. The policy is printed in full in the record, pages 10-22.

Shortly after the accident to Virginia Christensen, Canadian, on October 28, 1954, commenced this action against Ohio in declaratory relief, seeking to determine the rights and liabilities of Canadian and Ohio under their respective policies to defend against or pay any liability of Louis Stores, Inc. and its employees as a result of the injuries sustained by said Virginia Christensen. The complaint was later amended to include Prudential as a defendant (R. 3-5).

Thereafter, said Virginia Christensen commenced an action on January 31, 1955, in the Superior Court for Alameda County against Louis Stores, Inc. and others, seeking to recover for the personal injuries suffered in the Louis store on September 17, 1954. The amended complaint in that action alleges that "defendants, and each of them, so carelessly and negligently operated, maintained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner so as to render said aisle dangerous to the passage of customers." (Par. VIII, R. 35).

The Christensen action was tried to a jury, which returned a verdict in favor of Virginia Christensen in the amount of $35,000.00 against defendants Louis Stores, Inc. and Clifton Land. The jury found in favor of defendant Earl Correia.

The Superior Court instructed the jury that it could return a verdict against defendant Louis Stores, Inc. alone, and not against its employee, Land. The Court also gave the jury five forms of verdict. One of such forms permitted the jury to find in favor of plaintiff Virginia Christensen against defendant Louis Stores, Inc. alone, and to find in favor of its employees, defendants Earl Correia and Clifton Land (Finding III, R. 49-50).

The instructions to the jury and the forms of verdict referred to above were introduced in the Court below as defendants' Exhibits A and B and as plaintiff's Exhibit 3, respectively. However, none of said exhibits has been printed in the record now before this Court.

All of the evidence received in the Superior Court action was not introduced in the trial of this action in the Court below. Appellant merely introduced below the testimony of defendants Earl Correia and Clifton Land. The Court below did not, therefore, have before it all of the evidence presented to the jury in the Superior Court action.

Appellant refers to the testimony in the Superior Court action of Earl Correia and Clifton Land, which was received in evidence in the Court below as plaintiff's Exhibits Nos. 1 and 2 (Brief, pp. 6-7). However, such testimony has not been printed in the record

and hence under Rule 17(6) will not be considered by this Court.

Appellant has not, in any event, fully summarized the testimony of Land and Correia.

Land testified that he was at the check stand checking out customers when he was informed of the accident to Virginia Christensen; he was the only clerk available at that time to check out customers (page 3). He had asked the courtesy boy to bring up a case of Alhambra distilled water when he received a request from a customer for such water; Land was then at the check stand and had a number of customers waiting; the boy put the box in the aisle against the shelf; Land took one bottle out of the case and went back to wait on the customers and was still doing so when he heard of the accident shortly thereafter (pages 6-9). It was not unusual to have a steady stream of customers at the check stand on a Friday night (page 10). Land's duty was to remain at the check stand when he was alone and he had been instructed to remain there by the officials of Louis Stores, Inc. He was also instructed to remain at the check stand and not to put stock on the shelves as long as there were customers checking out. He followed such instructions (pages 11-12).

Correia testified that he was manager of the store, but he received orders from Holmes, the supervisor; the actual operation of the store was based on directives from the "office" and safety instructions were received from the supervisor (page 3). He testified that Friday night was usually busier than the rest of the week and that this particular store had a heavy

patronage for its size (page 8). He left Land and Nolan, the courtesy boy, to handle the store until closing time. The courtesy boy was not allowed to put stock on the shelves (page 9). Correia did not anticipate that the shelves would be stocked during that time and it was not usual to stock shelves with only one clerk on duty (page 10).

None of the testimony of the other witnesses who testified in the Superior Court action was introduced in the trial of this action.

The Court below found that it cannot be determined whether the judgment against Louis Stores, Inc. in the Christensen action was based on independent negligence and/or on the basis of respondeat superior for the acts or omissions of its employee, Clifton Land; that there was sufficient evidence in the record to support a verdict on either basis; that the Superior Court had given instructions and forms of verdict allowing the jury to find against Louis Stores, Inc. on the basis of independent negligence on its part (Findings III and IV, R. 49-50).

The Court further found that the policies of Canadian and Ohio primarily and concurrently insured the liability of Louis Stores, Inc. arising from the Christensen judgment, and that such liability should be prorated between said two insurers on the basis of their respective policy limits (Finding VII, R. 53-54).

The Court further found that none of the policies insured Clifton Land; that Prudential's policy was excess to Ohio's policy and did not attach unless and until the limits of Ohio's policy had been exhausted (Findings V, VI, VIII, R. 50, 53, 54).

The Court accordingly concluded that Louis Stores, Inc. and Clifton Land were held jointly liable by the verdict and judgment in the Christensen action; that Clifton Land was not an insured under any of the policies; that Canadian was obligated to pay ten-elevenths of the Christensen judgment and Ohio was obligated to pay the remaining one-eleventh thereof; that Prudential's excess policy did not therefore attach (Conclusions of Law, R. 55-56). Judgment setting forth such respective obligations was entered on the findings of fact and conclusions of law (R. 57).

QUESTIONS PRESENTED.

It is not disputed that Canadian and Ohio concurrently insured the liability of Louis Stores, Inc. arising from the Christensen judgment. Canadian, nevertheless, attempts by the present action to avoid payment of *any part* of the Christensen judgment against Louis Stores, Inc., for which its policy is admittedly liable, and to shift the entire liability onto Ohio and Prudential.

Appellant's statement of the "Questions Presented" is so worded as to emphasize such purpose on the part of Canadian, but does not correctly state the issues on this appeal.

The questions presented are merely whether the following findings and conclusions of the Court below are clearly erroneous:

1. Clifton Land was not an assured under the policies of either Ohio or Prudential.

2. The verdict of the jury in the Christensen action against Louis Stores, Inc. was not based solely upon respondeat superior for the acts or omissions of Land.

It is clear that the judgment below must be affirmed unless *both* such findings are clearly erroneous.

Appellant has made no specification of error as to Findings VII or IX (R. 53-54) or Conclusions of Law III or V (R. 55-56). It is, therefore, admitted that the judgment of the Court below pro-rating the obligation of appellant and Ohio to satisfy the Christensen judgment in the respective proportions of ten-elevenths and one-eleventh is correct if the findings and conclusions referred to above are not both clearly erroneous.

ARGUMENT.

I.

PRUDENTIAL'S POLICY DOES NOT INSURE CLIFTON LAND.

The trial Court found that neither the policy of Ohio nor that of Prudential insured Clifton Land (Finding VI, R. 53; Finding VIII, R. 54). Appellant's first point is apparently intended to attack these findings, but it does not directly do so. Its specifications of error (2) and (3) merely state that the District Court erred in so finding (Appellant's brief, page 9). There is no attempt to state wherein said findings are alleged to be erroneous as required by Rule 18, subdivision 2(d).

It would also appear essential to have the entire policy of Ohio in the printed record, if appellant in-

tends to attack the trial Court's interpretation of the policy. Appellant itself asserts that "the document must be considered as a whole and no part of it may be disregarded" (Brief, page 10). But appellant has printed only brief excerpts from Ohio's policy (R. 1-2, Finding VI, R. 51-53).

It is apparently appellant's contention that Clifton Land was an insured under Ohio's policy and, based on that premise, was also an insured under Prudential's policy. Such argument is based wholly on endorsement No. 4, entitled "Defense of Employees", attached to Ohio's policy (R. 51-53). We believe that a consideration of all the relevant factors involved will demonstrate the correctness of the findings that neither Ohio nor Prudential insured Land.

A. Ohio Did Not Insure Land.

Appellant completely ignores the principal insuring agreements of Ohio's policy and relies wholly on endorsement 4 (Brief, pages 10-19). The trial Court pointed out in its opinion that Ohio's policy provided (R. 44-45):

> "Item 1. Name of Insured—Louis Stores, Inc.
>
> * * * * * * *
>
> *Insuring Agreements*
>
> III. Definition of Insured.
>
> The unqualified word 'Insured' includes the Named Insured and also includes (1) under Coverages B & D, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such * * *."

The coverage of the policy applicable in this instance also provides:

> "Coverage B—Bodily Injury Liability—Except Automobile
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident." (R. 1-2).

The foregoing fundamental provisions of the policy cannot be ignored, and they establish that Land was not an insured named or designated by class, in Ohio's policy, as pointed out by the trial Court (R. 44).

Endorsement 4 does not, as appellant contends, constitute Land, the employee, an insured under the policy. On the contrary, such endorsement is merely a supplementary agreement between the insurer and the insured, Louis Stores, Inc., wholly for the latter's benefit. It does not modify, conflict with or render uncertain the provisions of the policy set out above.

Endorsement 4 is significantly entitled "Defense of Employees." It consists of five provisions. Appellant laboriously analyzes each provision separately, picking on a word here and there, in an endeavor to find some basis upon which to fasten its contention that Land is thereby made an insured.

The first paragraph of endorsement 4 certainly contains no provision constituting any employee an insured (R. 51-52). It merely provides that Ohio will defend employees of the named insured in certain types of suits at the request of the named insured. Such provision is clearly for the benefit of the named insured who is the *only* one who can enforce it.

Appellant states again and again in its brief that the insured did request Ohio to defend the three employees sued in the Christensen action (Brief, pages 4, 8, 11, 18, 19). This matter seems to give appellant particular concern and it apparently hopes that its statement will gain strength by repetition. The facts are simply that the attorney retained by appellant to defend Louis Stores, Inc., wrote a letter to Ohio demanding that Ohio defend the three employees in the Christensen action. (Demand for admissions, pars. 3, 6, Exhibit B, R. 23-24, 31.) Ohio did defend the employees. Such evidence shows a request by *appellant,* not by the named *insured,* to defend the employees. There is no evidence in the record that appellant's attorney had any authority to make such request on behalf of Louis Stores, Inc.

Paragraph 2 of the endorsement provides that Ohio will also pay, within policy limits, loss by liability imposed upon said employees by final judgment in the types of suit specified in the first paragraph (R. 52). Since the defense of such suits is wholly in the control of the named assured as provided in the first paragraph, it is clear that paragraph 2 is also wholly for the benefit of the named assured, who alone can enforce such provisions. The employee merely receives the benefit of free defense at the request of the named insured and payment of a judgment against, or which could have been rendered against, the named insured.

Appellant refers to section 23, *California Insurance Code,* to support its contention. The definition therein set forth refers to indemnity by *insurance,* not to any type of indemnity. The insurance provided by Ohio's

policy is, however, a contract with Louis Stores, Inc., not with any employee.

Transportation Guarantee Co. v. Jellins, 29 Cal. 2d 242, 174 P. 2d 625.

Paragraph 3 provides that it is understood and agreed that the policy is a contract between Ohio and the named insured and that nothing therein shall be construed as creating any privity of contract between Ohio and any employee of the named insured, and that no rights are conferred on any employee which said employee would not have had if this paragraph (endorsement) had not been written.

Appellant states that paragraph 3 is a recital of law whereas the other four paragraphs are operative. Paragraph 3 is, however, an express, contractual provision of the endorsement and clearly sets forth the intent and effect of the endorsement.

Paragraph 4 merely provides that Ohio will provide no coverage except where the act of the employee is committed in good faith and is within the scope of employment (R. 52). Appellant states that by necessary implication the company does provide coverage in this case (Brief, page 14). There is no necessity for implication. The policy, as seen from paragraphs 1, 2 and 3 of the endorsement, does expressly provide coverage but such coverage is for Louis Stores, Inc. only.

Paragraph 5 states that the insurance provided by endorsement 4 shall be excess insurance over any other valid, collectible insurance available to any employee of the named insured (R. 53). Again, plaintiff states that by necessary implication the endorsement does

provide insurance because, otherwise, paragraph 5 would make no sense. As stated above, the endorsement does expressly provide insurance for Louis Stores, Inc. Paragraph 5 does make sense because the endorsement would provide only excess insurance to Louis Stores, Inc. if it had another policy containing the same coverage. The policy, however, is a contract only between Ohio and Louis Stores, Inc.

Appellant cites authorities to the effect that any ambiguity in a policy of insurance must be resolved against the insurer (Brief, pages 10, 13, 17, 18). The rule has not been fully stated by appellant. It applies only between the insurer and the insured, which, in this instance, is Louis Stores, Inc. The rule has no application at all in favor of a complete stranger, such as appellant, to the policy. Likewise the rule has no application if the insured is responsible for the language used.

Thus, in *American Lumbermen's Mutual Casualty Co. v. Trask,* 266 N.Y.S. 1 (affirmed 191 N.E. 557), an action between the insurer and a stranger to the policy, the Court said:

> "The rule of strict construction against the insurance company is not, however, applicable in favor of the defendant. The plaintiff is here seeking to enforce its right as against a stranger to the contract."

In *Nieschlag & Co. v. Atlantic Mutual Insurance Co.,* 43 F. Supp. 797, 799 (affirmed 126 F. 2d 834 (2 C.A.A.)), the Court said:

> "* * * In addition the plaintiff itself insisted upon the form used. For these reasons, the prin-

> ciple that the form should be construed most strongly against the insurer should be held inapplicable."

On the contrary, if there is any doubt or ambiguity in the endorsement, such doubt must be resolved against appellant, a stranger to the contract. For, as said in *Chamberlin v. City of Los Angeles,* 92 Cal. App. 2d 330, 332, 206 P. 2d 662:

> "An intent to make an obligation inure to the benefit of a third party must clearly appear in a contract of insurance and if any doubt exists it should be construed against such intent."

The statement of the California Supreme Court in *Transportation Guarantee Co. v. Jellins,* 29 Cal. 2d 242, 245, 174 P. 2d 625, 627, is also peculiarily appropriate here, since appellant, a stranger to the policy, also contends that Land, another stranger thereto, becomes an insured:

> "Certain language in the contracts, which seemingly is inconsistent with other provisions thereof, is pointed to by defendant as constituting what he claims to be 'insuring clauses.' Contending that the language of these clauses *can* be construed to constitute an insurance obligation it is urged that it *should* be so construed because 'If there is any ambiguity (in an insurance contract) it is to be construed most strongly against the insurer.' This argument is entitled to no weight since it seeks to persuade that plaintiff *is* an insurer by applying the rule that would be applicable *only if it were one.*" (Court's emphasis.)

But, while appellant mentions rules of law referring to ambiguity, it utterly fails to point out any am-

biguity in the language of endorsement 4. There is, then, no ambiguity or uncertainty in the language to be *interpreted* in favor of anyone. Likewise, there is no inconsistency between the endorsement and the definition of insured and the insuring agreements in the body of the policy. Clifton Land, the insured's employee, is clearly not an insured under either the "Definition of Insured" or under the endorsement.

Therefore, as stated in *Continental Casualty Co. v. Phoenix Construction Co.,* 46 Cal. 2d 423, 432, 296 P. 2d 801, 806:

> "An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected."

Appellant also contends that all five paragraphs of endorsement 4 must be given effect and that operative parts of the endorsement govern recitals. Such contention presents no problem here. The construction given to the endorsement by the Court below does give effect to the entire endorsement. There is no conflict among the five paragraphs thereof. The Court found that none of the paragraphs states or implies that Land is an assured (R. 44-46). Paragraphs 1 and 2 are, by their express language, for the benefit only of the named insured, Louis Stores, Inc. Paragraphs 4 and 5 refer again only to the coverage of Louis Stores, Inc., since they refer to the coverage provided in paragraphs 1 and 2. Furthermore, paragraphs 4 and 5 are not involved on the facts of this case. To avoid even the possibility of anyone making appellant's present contention, paragraph 3 expressly and clearly provides

that there is no privity of contract between Ohio and any employee of Louis Stores, Inc.

Appellant does not, of course, contend that paragraphs 1, 2, 4 and 5 expressly provide that an employee of Louis Stores, Inc. is an insured. It contends that the endorsement as a whole should be so *construed.* On the other hand, paragraph 3 expressly provides that the endorsement shall *not* be so construed. Appellant states that paragraph 3 is a recital. It is, however, an express, clear, contractual provision between the parties and must be given effect.

Appellant's contention, therefore, is simply this: Paragraphs 1, 2, 4 and 5 are not free from doubt and should be construed against Ohio in favor of appellant, a complete stranger to the contract. Paragraph 3 is clear but is a recital.

Such contention is wholly refuted by appellant's own quotation from II *Williston on Contracts,* page 1201, note 98, as follows (Brief, page 16):

> "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. * * *"

Appellant's requested construction of the endorsement would not only give it a meaning not found in the language thereof, but would also ignore completely the clear, express provisions of paragraph 3. The authorities cited by appellant itself show the impropriety of such construction.

Appellant states that the underlining by the Court below in its opinion of the words "if and when requested in writing to do so by the named insured" in

the first paragraph of endorsement 4 is the only indication by the Court as to its reasons for holding that endorsement 4 does not make Land an insured under Ohio's policy (Brief, pages 18-19). Appellant is quite mistaken. The trial Court clearly stated its reasons to the effect that neither the language of the policy proper nor of the endorsement made Land an insured or gave him the right to enforce it (R. 44-46).

If it may be inferred from the Court's underlining of parts of paragraphs 1 and 2 that it found that the named insured did not request Ohio in writing to defend the insured's employees, such finding would be strictly in accord with the facts. Louis Stores, Inc. did not request in writing Ohio to defend the employees. Appellant's attorney made such request.

Appellant makes a suggestion and admission as to the effect of endorsement 4 which not merely shows the fallacy of its contention that Ohio insured Land, but which is fatal to such contention.

Canadian suggests that paragraph 3 of endorsement 4 means that an employee has no right, acting on his own, to require Ohio to defend him or pay any judgment against him unless and until the conditions of paragraph 1 are met. But, it states, once such conditions are met, the employees *then* become insureds (Brief, pages 14-15).

It is, of course, obvious that the conditions of paragraph 1 of the endorsement cannot be met until *after* the insured event has occurred and is known. The Christensen accident was certainly known to both

Louis Stores, Inc. and Land before the Christensen action was filed. If Land was not an insured under Ohio's policy before the accident, as appellant concedes, then Land could not become an insured after the accident had not only occurred but was known to have occurred. For, as stated in *Vyn v. Northwest Casualty Co.,* 47 A.C. 84, 89, 301 P.2d 869, 872:

> "Clearly, under plaintiff's theory there would not be an insurance contract, under the facts here presented, because the contingency was known to both plaintiff and Norwich when the premium was paid. 'Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event.' (Ins. Code, Sec. 22.) 'Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code.' (*Id.,* Sec. 250.) The exceptions refer to lotteries, gaming and wagering (*id.,* Secs. 251-252)."

Land could not, under the provisions of the California Insurance Code quoted above, become an insured under Ohio's policy *after* the event (the Christensen accident) was neither contingent nor unknown.

The trial Court's finding that Ohio's policy does not insure Land is, therefore, manifestly correct.

B. Prudential Did Not Insure Land.

The trial Court also found that the Prudential policy, which is only an excess policy, does not insure

Land (Finding VIII, R. 54). The Prudential policy does not contain any provisions of the nature of endorsement 4 in Ohio's policy (R. 10). Appellant's contention that such endorsement makes Land an insured under Ohio's policy after the known loss is not, therefore, in any event, applicable to Prudential's policy.

Appellant states that if Ohio is obligated to pay Land's liability under the Christensen judgment, Prudential is similarly obligated by virtue of having the same warranties, terms and conditions in its policy. The statement is not accurate as to the terms of Prudential's policy, and appellant's conclusion does not follow. It is made without argument or elaboration, and we trust that appellant is not holding back any argument for its reply brief.

No employee of Louis Stores is insured under Prudential's policy for a number of reasons.

1. The policy names Louis Stores, Inc. and no one else as the insured (R. 10). The policy contains no provision giving automatic coverage to any other person or persons.

Section 387, California Insurance Code, provides:

> "When the name of the person intended to be insured is specified in a policy, it can be applied only to his own interest."

In referring to Section 387 of the Insurance Code, formerly Section 2588 of the Civil Code, the Court said in *Van DerHoof v. Chambon,* 121 Cal. App. 118, 128, 8 P.2d 925, 929:

> "It will be seen from an examination of the policy that it insures Gus Chambon and no other person. The name of the person is inserted in the policy and under section 2588 of the Civil Code it can be applied only to his own proper interest."

The Prudential policy names only Louis Stores, Inc. as the insured and does not refer to the assureds or assureds named or provided for in the underlying Ohio policy. On the contrary, the policy specifically names the assured and refers only to the "hazards" covered by the underlying policy (R. 10, 13).

The rule is well established that an insurance policy insures only the persons named or designated in the policy and cannot be held to include unnamed persons by inference or by doubtful provisions.

Willamette Nav. Co. v. Hartford Fire Ins. Co., 287 Fed. 464, 467 (9 C.C.A.)

Klefstad v. American Cent. Ins. Co., 207 F. 2d 288, 289-290 (7 C.C.A.)

National Auto. Ins. Co. v. I. A. C., 11 C. 2d 694, 697, 81 P. 2d 928, 930;

Chamberlin v. City of Los Angeles, 92 C.A. 2d 330, 332; 206 P. 2d 661, 662.

2. Appellant apparently relies upon Condition 5 of the Prudential policy to claim that if Land is an assured under Ohio's policy, he is also an assured under Prudential's policy by virtue of Condition 5 in the latter policy, which reads (R. 16):

> "5. Maintenance of Primary Insurance. This Certificate is subject to the same warranties,

terms and conditions (*except* as regards the premium, *the obligation to investigate and defend,* the amount and limits of liability and the renewal agreement, if any, and *except as otherwise provided* herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Certificate, then the premium hereon shall be adjusted accordingly." (Emphasis ours).

We think that it is obvious that a reference to the warranties, terms and conditions of the primary policy does not include the designation or name of the assured or the naming of an additional assured, particularly when the Prudential policy expressly states that the insurance is bound in favor of Louis Stores, Inc.

The name or designation of the assured is clearly not a warranty. A warranty is a stipulation of fact or promised line of conduct *by* the assured set forth in the policy on the literal truth or fulfillment of which the validity of the entire contract depends.

California Insurance Code, sections 441, 444;

McKenzie v. Scottish U. & N. Ins. Co., 112 Cal. 548, 554; 44 P. 922, 924;

Gise v. Fidelity & Casualty Co., 188 Cal. 429, 433; 206 P. 624, 626.

Thus, the insured may warrant that he has never had heart disease, or that he will maintain a watchman on the insured property. Warranties are fre-

quently referred to as conditions precedent or subsequent, breach of which avoids the policy. However, there may be other conditions which are not warranties, but which restrict or limit the coverage of the policy, or even avoid it. Thus, it may be a condition of the insurance that it will be void if the assured procures other insurance, or fails to pay the premium, or keeps explosives on the premises. To be more specific, the Ohio policy sets forth 19 clauses designated "Conditions", none of which contains any provision as to who is or may become the insured.

It is equally clear that the reference to the "terms" of the primary policy refers to the hazards insured against, such as bodily injury, property damage, and to the limitations and restrictions thereon, and not to the person or persons insured. Thus, the Prudential policy states that it insures Louis Stores, Inc., "subject to the terms, conditions and limitations hereinafter mentioned." The persons insured in Prudential's policy are not, therefore, determined or affected by the reference to part of the "warranties, terms and conditions" of the underlying policy.

In the Court below, appellant argued that Prudential, having issued an excess policy naming Ohio's policy as the primary, underlying policy, could not say that it covered less than the underlying policy. The Prudential policy expressly provides that it covers less than the Ohio policy and there is no reason that it may not so provide.

In *National Auto Insurance Co. v. I.A.C.,* 11 Cal. 2d 689, 691; 81 P.2d 926, 927, the Court said:

"The right of an insurer to limit its contract of coverage may not be questioned."

The insuring clause of Prudential's policy does expressly limit its coverage to the liability of Louis Stores, Inc. for *personal injuries* arising out of the *hazards* covered by Ohio's policy. Prudential does not cover liability for property damage, costs of defense and other items insured by Ohio (R. 12-13).

3. Condition 5 of the Prudential policy, quoted above pages 20-21, expressly also *excludes* application of the warranties, terms and conditions of Ohio's underlying policy as to the premium, *the obligation to investigate and defend,* the amount and limits of liability and the renewal agreement, if any, and also excludes provisions which are *otherwise provided for in Prudential's policy.*

The very nature of the exceptions thus expressly set forth illustrates the nature of the provisions of Ohio's policy intended by the words "Warranties, terms and conditions." It is, therefore, clear that such reference does not make endorsement 4, entitled "Defense of Employees", in Ohio's policy, a part of Prudential's policy. On the contrary, condition 5 of Prudential's policy, quoted above, expressly *excludes* the provisions of endorsement 4 from its excess policy. Any obligation to pay provided for in said endorsement is limited to a judgment in a suit which Ohio is obligated to *defend.* Since Prudential could not have any obligation *to defend* any of the insured's employees, it cannot have any obligation to pay, which is wholly dependent on the obligation to defend. The

interdependent provisions of Ohio's endorsement 4 cannot be segregated to fasten upon Prudential a liability which it has clearly and expressly excluded from its policy. Prudential's coverage of its insured, Louis Stores, Inc. against liability for personal injuries is not, of course, dependent on any obligation to defend.

4. Condition 5 of Prudential's policy also provides that it is subject to warranties, terms and conditions contained in the primary policy "except as otherwise provided herein" (pages 20-21 above). Prudential has not only expressly excluded from its policy Ohio's endorsement 4 ("Defense of Employees") as discussed above, but has by endorsement provided how persons other than the named insured may become insureds in the Prudential policy. Endorsement 3 on the Prudential policy provides that persons with whom the insured (Louis Stores, Inc.) has *contracted* to protect by insurance shall be deemed insureds under Prudential's policy with specified limitations (R. 20-21). Such provision for additional insureds is quite *different* from the "Defense of Employees" endorsement on Ohio's policy. Pursuant to condition 5 of Prudential's policy, it would not be subject to the endorsement on Ohio's policy, but would be subject only to its own endorsement 3 which provides "otherwise" in such respect.

Appellant refers to Prudential's endorsement 3 without explanation (Brief, page 18). We do not know whether appellant thereby hopes to imply that Louis Stores, Inc. contracted with Land to protect him by insurance. The fact is that Louis Stores, Inc. had

not contracted with Land to protect him by insurance and no evidence was offered to show any such contract. The Ohio policy is obviously not a contract between Louis Stores, Inc. and Land.

Brief reference is made by appellant to *Continental Casualty Co. v. Phoenix Construction Co.,* 46 Cal. 2d 423; 296 P. 2d 801, as concluding that an excess policy increases the protection of an insured under a primary policy by having the same warranties, terms and conditions.

The *Continental* case involved different policy provisions and questions from those presented in the present case. The excess policy there expressly named as insureds, (page 439): "Oilfields Trucking Company, *et al.* and other persons . . . named as insureds under said policies, *all hereinafter called the Assured.*" (Our emphasis.) A "condition" of the primary policy incorporated the motor vehicle "Financial Responsibility Laws" of California and under such laws an employee-truck driver was an automatic insured under the primary policy. This is a very different reference to or naming of insureds from that appearing in Prudential's policy in this case. The policy here concerned names only one insured, excludes coverage for "Defense of Employees," and has its own provision for naming any additional insureds.

It is, therefore, respectfully submitted that the findings of the trial Court are correct that Land was not an insured under the policies of either Ohio or Prudential.

II.

THE VERDICT OF THE JURY IN THE CHRISTENSEN ACTION IS CONCLUSIVE IN THIS ACTION THAT LOUIS STORES, INC. WAS HELD LIABLE FOR ITS INDEPENDENT NEGLIGENCE.

This issue need not, of course, be determined if the finding of the trial Court that Land was not an insured under the policies of either Ohio or Prudential is affirmed. Since, as discussed, Land was not insured under either of those policies, the judgment must be affirmed regardless of whether Louis Stores, Inc. was held liable to Mrs. Christensen on the theory of *respondeat superior* or as a joint tort-feasor. Conversely, the judgment must also be affirmed if Louis Stores, Inc. was guilty of independent negligence, even though Land was an insured in Ohio's policy. For, if Louis Stores, Inc. admittedly insured by both appellant and Ohio, was independently negligent, there can be no question of primary or secondary liability to satisfy the Christensen judgment. Appellant, by this action, sought a full determination on all issues as to the respective liabilities of the parties arising out of the injuries to Mrs. Christensen.

Appellant's specification of error (1) addressed to this contention states that finding IV is erroneous for the reason that the record in the Superior Court case had no evidence sufficient to support a verdict and judgment against Louis Stores, Inc. upon the basis of independent negligence (Brief, page 9). Such alleged error, based wholly on appellant's gratuitous statement, may not be considered at all for two reasons. First, appellant, *who had the burden of proof,*

did not introduce *all* of the evidence in the Superior Court action.

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F. 2d 541, 546 (9 C.C.A.).

Second, the verdict and judgment in the Superior Court action are conclusive upon appellant and the issues therein cannot be relitigated in this action.

A. The Verdict and Judgment in the Christensen Action Conclusively Establish in This Action That Louis Stores, Inc. Was Held Liable for Its Independent Negligence.

It is well established that liability insurers, having notice, are conclusively bound by the proceedings, the verdict and judgment in the action brought by the injured person against their insured. This is particularly true, where, as here, appellant actively defended its insured, Louis Stores, Inc. in the Christensen action (R. 24, par. 6).

In *Parra v. Traeger,* 214 Cal. 535, 6 P. 2d 941, an insurer attempted in an action against it by the insured to relitigate the issue as to whether or not a taxicab was being used as such by the driver when it struck and injured a third person who had recovered against the insured in a separate action. The Court said, page 538 (6 P. 2d 941-2):

> "The judgment in said action, and its affirmance by this Court upon appeal, determined that issue conclusively, both as against said Parra and his employee Fernandez, the defendants therein, and as against Parra's insurer, which, in conform-

> ity with the terms of its policy, had undertaken the defense of said action and had maintained the same until the final conclusion thereof upon said appeal."
>
> * * * *
>
> "This Court has uniformly held that where the insurer, upon such indemnifying policy and under its express agreement therein so to do, undertakes, on behalf of its insured, his defense in an action covered by the terms of its said policy, whatever judgment is rendered and entered therein against the assured is binding and conclusive against the insurer."

The same rule is stated in *Lamb v. Belt Casualty Co.*, 3 Cal. App. 2d 624, 631, 40 P. 2d 311 in a case involving in principle the same question presented here.

This Court has followed the California decisions in applying the same rule:

> *Ocean Accident & Guarantee Corporation v. Torres,* 91 F. 2d 464, 471;
>
> *Maryland Casualty Co. v. Lopopolo,* 97 F. 2d 554, 556.

It appears from the Superior Court record that the issue which appellant now seeks to litigate was presented and determined in the Christensen action adversely to appellant's present contention. Under the above authorities the Christensen verdict and judgment are conclusive against appellant.

The Christensen amended complaint alleged that "defendants, and *each of them,* so carelessly and negli-

gently operated, maintained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner so as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery department thereof lawfully using said aisle." (Par. VIII, R. 35) (emphasis ours).

The complaint also alleges that said grocery department was operated by Louis Stores, Inc. and that the accident occurred as a direct and proximate result of said carelessness and negligence of defendants and *each of them* (Pars. VI, IX, R. 34, 35).

Said allegations, under California law, clearly plead concurrent negligence on the part of Louis Stores, Inc. and its employees.

> *Jensen v. Southern Pacific Co.,* 129 Cal. App. 2d 67, 70, 276 P. 2d 703, 706.

Appellant refers to the case of *Pleasant Valley Association v. Cal-Farm Insurance Co.,* 142 Cal. App. 2d 126, 298 P. 2d 109. The Court there concluded, based on both the complaint and a stipulation of facts, that all of the acts complained of were the undirected acts of the employee. Neither the complaint nor the evidence presented the issues involved in the Christensen action.

In addition to the allegations of the Christensen complaint, the Superior Court gave an instruction to

the jury that they could find a verdict against Louis Stores, Inc. alone and not against its employees. Said Court also gave to the jury a form of verdict to the same effect (Finding III, R. 49-50). Said instruction and form of verdict *conclusively* establish in this action that there was evidence presented to the jury in the Christensen action which would permit a finding of negligence on the part of Louis Stores, Inc. not based solely on *respondeat superior* for the acts of its employees.

For, such instruction and form of verdict would be improper if the liability of Louis Stores, Inc. depended solely on *respondeat superior.* On the other hand, such instruction and form of verdict is proper where the evidence would support a finding of independent negligence on the part of the employer.

Thus, in *Jensen v. Southern Pacific Co.,* 129 Cal. App. 2d 67, 276 P. 2d 703, the Court said, pages 69-70 (276 P. 2d 705-706):

> "If the company's liability, predicated upon negligent operation of the train, rested solely upon *respondeat superior* and not upon its own independent tort, exoneration of the trainmen would have exonerated the company. (*Freeman v. Churchill,* 30 Cal. 2d 453, 461 (183 P. 2d 4), and authorities there cited.)
>
> However, in the instant case, plaintiffs in one of the counts of the complaint, pleaded concurrent liability upon the part of the company and the trainmen. Such allegations presented the possibility of proof of independent negligence upon the part of the company."

Such rules are well established in California:

Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948.

McInerney v. United Railroads, 50 Cal. App. 538, 195 P. 958.

McCullough v. Langer, 23 Cal. App. 2d 510, 516, 73 P. 2d 649, 652.

Newman v. Fox West Coast Theatres, 86 Cal. App. 2d 428, 433, 194 P. 2d 706, 708-709.

In view of the allegations of the amended complaint and the instruction and form of verdict given by the Court in the Christensen action, the general verdict of the jury against Louis Stores, Inc. and its employee, Land, constituted an implied finding of joint liability against said defendants. Such finding is, as discussed above, conclusive in the present action.

Thus, in *Benson v. Southern Pacific Co.,* 177 Cal. 777, 171 P. 948, the jury brought in a verdict against the employer, but made no mention of the employee. The complaint alleged concurrent negligence on the part of employer and employee, although the Court gave the jury an instruction on *respondeat superior.* The Court held, page 780 (171 P. 949):

> "* * * All intendments being in favor of the verdict, it must be considered that the jury based the same upon a finding of joint liability, unless there is something in the record which prevents that conclusion."

Likewise, in *Lamb v. Belt Casualty Co.,* 3 Cal. App. 2d 624, 40 P. 2d 311, it became important to determine for purpose of insurance whether a trailer

as well as its towing truck had been operated negligently. The complaint in the correlative third party action for personal injuries alleged the negligent operation of both truck and trailer. The jury brought in a general verdict in favor of the injured persons. The Court said in the insurance litigation, comparable to the present case (pages 628, 632, 40 P. 2d 313, 314):

> "These complaints allege negligent operation of the truck as well as the trailer, and that negligent operation of both resulted in injuries to the plaintiffs, and a trial was had on these issues. By returning general verdicts awarding damages to the plaintiffs, Davis and Barr, the jury in each case impliedly found that both truck and trailer were at the time of the accident being operated negligently and that the negligent operation of the truck as well as the trailer, contributed proximately to the injuries complained of and to the damage of the plaintiffs in the amounts awarded.
>
> * * * *
>
> "The judgments establish the liability of the insured arising out of the operation of both the truck and the trailer, and are conclusive as against the insurer on each vehicle, but do not express the proportion of the liability which each insurer is obliged to meet."

A general verdict is, of course, a finding in favor of the prevailing party on all material issues, particularly those covered by instructions.

Appellant is, therefore, conclusively bound by the implied finding of the jury in the Christensen action that Louis Stores, Inc., the employer, was liable for

its independent negligence concurring with that of its employee.

B. The Finding of the Court Below Must Be Affirmed Where the Evidence Is Conflicting or the Record on Appeal Is Incomplete.

The Court below found that it cannot be determined whether the verdict and judgment against Louis Stores, Inc. in the Christensen action was based on its independent negligence and/or on the basis of *respondeat superior* for the acts or omissions of its employee, Clifton Land. The Court further found that there was evidence to support a verdict on either basis (Finding IV, R. 50). Since the appellant (plaintiff below) had the burden to prove its contentions and failed to do so, the Court concluded that Louis Stores, Inc. and its employee, Land, were held jointly liable by the verdict and judgment against them in the Christensen action (Conclusion of Law I, R. 55).

The Court below had before it as evidence the Christensen amended complaint, the verdict of the jury, the Superior Court instructions, the forms of verdict and the testimony of Land and Correia. If this testimony be deemed conflicting on the issue of the independent negligence of Louis Stores, Inc., the finding of the trial Court must be affirmed.

> *Bolander v. Godsil,* 116 F. 2d 437, 439 (9 C.C.A.).

However, it also appears that appellant has failed to print, as required by Rule 17(6), the Superior Court instructions, the forms of verdict and the testi-

mony of Land and Correia. Such evidence, which was before the trial Court, will not be considered by this Court. Hence, the finding of the trial Court, based in part on evidence not before this Court, will be accepted as correct.

Rosenblum v. Anglim, 135 F. 2d 512, 513 (9 C.C.A.).

Tozzi v. Balley, 148 F. 2d 660 (9 C.C.A.).

Finding IV and Conclusion of Law I, therefore, emphasize the conclusive effect of the jury's verdict in the Christensen action that Louis Stores, Inc. was held liable for its independent negligence.

C. The Testimony of Land and Correia Will Not Be Considered on This Appeal.

Appellant relies almost wholly on the testimony of Land and Correia to support its contention that Louis Stores, Inc. was held liable only on the basis of *respondeat superior.* Since such testimony has not been printed, it will not be considered on this appeal. The matter is not, in any event, important in view of the conclusive nature of the verdict against appellant's contention.

However, as found by the trial Court, their evidence does show independent negligence on the part of Louis Stores, Inc. It is clear from their testimony, summarized on pages 5-6 above, that Louis Stores, Inc. could have been found concurrently negligent in: (1) expressly instructing Land to remain at the check

stand when he was alone; (2) instructing him not to put stock on shelves when customers were checking out; (3) failing to instruct the store manager to have more than one clerk on duty at all times to care for the situation which arose on the evening of the accident (4) failing to provide enough employees (Correia assigned the clerks, but he did not hire them); (5) failing to supervise properly the operation of the store.

> *Benson v. Southern Pacific Co.,* 177 Cal. 777, 779, 171 P. 948, 959.

Appellant suggests that the exoneration of Correia negatives independent negligence on the part of the employer. Appellant does not correctly summarize Correia's testimony. But, under similar circumstances, it has been properly held that the exoneration of the manager emphasizes the independent negligence of the employer.

In *Newman v. Fox West Coast Theatres,* 86 Cal. App. 2d 428, 194 P. 2d 706, the corporate owner of a theatre was held liable although the manager thereof, who was on duty, was exonerated from liability for personal injuries suffered by a licensee as the result of a mess on the floor of a lavatory. The manager was aware of the condition but had done nothing to remedy it. The situation was quite similar to that presented in the Christensen action. The Court said, page 433 (194 P. 2d 708):

> "Appellant further contends that exoneration of defendant Brown necessarily relieves the corporation. The proof was that although a company

rule, required that the manager and an assistant be on the floor at all breaks, since one person was not sufficient in case of an emergency, but that on the night of the accident the last of the usherettes had left the theater before the accident leaving only Brown and the projectionist on duty. Thus the announced policy of appellant indicated an awareness of the need for adequate supervisory personnel. The jury therefore could have found that failure to have sufficient personnel efficiently to maintain the large theater in a safe condition was the proximate cause of the accident, and a verdict against the corporation and an acquittal of the manager is sufficient to sustain a judgment against the defendant corporation."

The same conclusion was reached in the following cases where the corporate employer was held liable and the manager or other employee was exonerated.

Jensen v. Southern Pacific Co., 129 Cal. App. 2d 67, 70, 276 P. 2d 703, 705-706.

McInerney v. United Railroads, 50 Cal. App. 538, 195 P. 958.

D. The Question of Active or Passive Negligence Was Not Raised in the Court Below.

Appellant contends as a final after-thought attempt to escape the effect of the verdict in the Christensen case that the negligence of the employer would be passive and that of the employee active. Even if we assume that such doctrine would apply to the circumstances involved in the Christensen case, it may not now be raised by appellant. Such issue was not raised

in the Court below and is now asserted for the first time on appeal.

However, it must be apparent that the negligence of Louis Stores, Inc., discussed above, was active and concurrent with that of its employee in causing the Christensen accident. The record in the Christensen action conclusively establishes the active nature of the employer's negligence. Acts done pursuant to express orders, failure to have sufficient personnel, or failure properly to instruct them is active negligence.

Newman v. Fox West Coast Theatres, 86 Cal. App. 2d 428, 432, 194 P. 2d 706, 708-709.

American President Lines, Ltd. v. Marine Terminals Corp., 234 F. 2d 753, bears no analogy to the present case. The right of indemnity was based on breach of the stevedores' contractual obligation. The shipowner and stevedore were not held jointly liable.

In this case Louis Stores, Inc., and Land were joint tort-feasors, and there was no contract between Land and the Store spelling out the basis for indemnity. Land was merely carrying out his employer's instructions.

CONCLUSION.

The findings of the Court below to the effect that (1) appellee Prudential did not insure Clifton Land and that (2) Louis Stores, Inc. was held liable for its independent negligence in the Christensen action are correct.

Appellant has not only failed to show that either of said findings is clearly erroneous, but has also failed to present to this Court a proper record to question said findings.

The judgment of the District Court should, therefore, be affirmed.

Dated, San Francisco, California,
April 3, 1957.

Respectfully submitted,
LLOYD M. TWEEDT,
STANLEY J. COOK,
DERBY, COOK, QUINBY & TWEEDT,
Attorneys for Appellee
Prudential Assurance Company.